

AMENDED IN SENATE APRIL 25, 2011

SENATE BILL

No. 342

Introduced by Senator Wolk

February 15, 2011

~~An act to amend Sections 19116, 19164, and 19504 of, to add Sections 18407.5 and 19165 to, to add Article 3 (commencing with Section 19761) to Chapter 9.5 of Part 10.2 of Division 2 of, to add the headings of Article 1 (commencing with Section 19751) to, Article 2 (commencing with Section 19755) to, and Article 4 (commencing with Section 19772) to, Chapter 9.5 of Part 10.2 of Division 2 of, and to repeal and amend Sections 19751, 19752, 19753, 19754, and 19755 of, the Revenue and Taxation Code, relating to taxation. An act to amend Section 19717 of, and to add Section 41 to, the Revenue and Taxation Code, relating to taxation.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 342, as amended, Wolk. ~~Income taxation: abusive avoidance transactions: voluntary compliance initiative.~~ *Taxation: administration: litigation: fees.*

Existing law provides that a prevailing party in a court action may be awarded attorney's fee under specified circumstances, and laws governing the administration of franchise and income tax laws provide that a prevailing party may be awarded a judgment for reasonable litigation costs incurred, in the case of any civil proceeding brought by or against the State of California in a court of record of this state, in connection with the determination, collection, or refund of any tax, interest, or penalty under the Personal Income Tax Law and the Corporation Tax Law as specified.

This bill would make the provision of law governing the administration of franchise and income tax laws the exclusive means to award attorney's fees in any civil proceeding described above, and would prohibit attorney's fees from being awarded pursuant to any other statutory provision or common law doctrine regarding the award of attorney's fees. This bill also would prohibit a person from charging a contingent fee, as defined, for any matter involving a tax imposed under the Revenue and Taxation Code, and would impose a penalty, as provided, for failing to comply with this requirement.

~~(1) Existing law requires the Franchise Tax Board to suspend the imposition of any interest, penalty, addition to the tax, or additional amounts for an individual who files a tax return on or before the due date, including extensions, if the board has not provided notice, with certain exceptions:~~

~~This bill would add interest, penalty, addition to tax, or additional amount relating to any abusive tax avoidance transaction, as defined, to the list of exceptions for which additional interest, penalties, and amounts may be charged.~~

~~(2) Under existing law, the Franchise Tax Board was required to develop and administer a voluntary compliance initiative, as specified, to be operative during the period of January 1, 2004, to April 15, 2004, for taxpayers to avoid specified penalties and tax liabilities for the use of abusive tax avoidance transactions if the taxpayer files an amended return and pays the tax due for transactions that occurred in taxable years beginning before January 1, 2003.~~

~~This bill would require a similar voluntary compliance initiative, to be operative during the period of April 1, 2011, to June 15, 2011, and relating to transactions that occurred in taxable years beginning before January 1, 2010.~~

~~(3) Under existing law, if a taxpayer has been contacted by the Franchise Tax Board regarding a specified reportable transaction, an amount equal to 100% of the interest payable is added to the tax amount.~~

~~This bill would make this provision, instead, applicable to abusive tax avoidance transactions, as defined, where the taxpayer has a deficiency. The bill would also reduce the amount of additional tax added for taxpayers who take specified actions.~~

~~(4) Existing law imposes various taxes and fees, and certain penalties in connection with tax avoidance and abusive tax shelters, including reportable transactions.~~

~~This bill would expand the definition of reportable transactions to include abusive tax avoidance transactions, as defined, and transactions of interest, as defined. This bill would also make technical, nonsubstantive changes to conform to the expansion of this definition.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 41 is added to the Revenue and Taxation*
2 *Code, to read:*

3 41. (a) *Notwithstanding any other law, no person shall charge*
4 *a contingent fee for services rendered in connection with any*
5 *matter before the State Board of Equalization, Franchise Tax*
6 *Board, any assessment appeals board, or for any other matter*
7 *involving a tax imposed under this code.*

8 (b) *For purposes of this section, “contingent fee” means any*
9 *fee that is based, in whole or in part, on whether or not a position*
10 *taken on a tax return or other filing avoids challenge or is*
11 *sustained either by the State Board of Equalization, Franchise Tax*
12 *Board, an assessment appeals board, or in litigation. A contingent*
13 *fee includes, but is not limited to, a fee that is based on a*
14 *percentage of the refund reported on a return, a fee that is based*
15 *on a percentage of the taxes saved, or a fee that depends on the*
16 *specific tax result attained. A contingent fee also includes any fee*
17 *arrangement in which the party to whom services are rendered,*
18 *or a designee of the party to whom services are rendered, is*
19 *reimbursed or credited for all or a portion of the fee paid or agreed*
20 *to be paid if a position taken on a tax return or other filing is*
21 *challenged or is not sustained, whether pursuant to an indemnity*
22 *agreement, a guarantee, a right of rescission, or any other*
23 *arrangement with a similar effect.*

24 (c) *Any person who fails to comply with subdivision (a) shall*
25 *pay a penalty equal to the amount of the contingent fee charged*
26 *to the governmental entity responsible for administering the tax*
27 *for which the contingent fee arrangement was entered.*

28 (d) *This section applies to all fee arrangements entered into on*
29 *or after the effective date of this act.*

30 SEC. 2. *Section 19717 of the Revenue and Taxation Code is*
31 *amended to read:*

1 19717. (a) The prevailing party may be awarded a judgment
2 for reasonable litigation costs incurred, in the case of any civil
3 proceeding brought by or against the State of California in a court
4 of record of this state, in connection with the determination,
5 collection, or refund of any tax, interest, or penalty under this part.

6 (b) (1) A judgment for reasonable litigation costs shall not be
7 awarded under subdivision (a) unless the court determines that the
8 prevailing party has exhausted all administrative remedies available
9 to that party under this part, including the filing of an appeal as
10 provided in Section 19324. Any failure to agree to an extension
11 of the time for the assessment of any tax shall not be taken into
12 account for purposes of determining whether the prevailing party
13 meets the requirements of the preceding sentence.

14 (2) An award under subdivision (a) shall be made only for
15 reasonable litigation costs which are allocable to the State of
16 California and not to any other party to the action or proceeding.

17 (3) No award for reasonable litigation costs may be made under
18 subdivision (a) with respect to any portion of the civil proceeding
19 during which the prevailing party has unreasonably protracted that
20 proceeding.

21 (c) For purposes of this section:

22 (1) "Reasonable litigation costs" includes any of the following:

23 (A) Reasonable court costs.

24 (B) Based upon prevailing market rates for the kind or quality
25 of services furnished, any of the following:

26 (i) The reasonable expenses of expert witnesses in connection
27 with the civil proceeding, except that no expert witness shall be
28 compensated at a rate in excess of the highest rate of compensation
29 for expert witnesses paid by the State of California.

30 (ii) The reasonable cost of any study, analysis, engineering
31 report, test, or project which is found by the court to be necessary
32 for the preparation of the party's case.

33 (iii) Reasonable fees paid or incurred for the services of
34 attorneys in connection with the civil proceeding, except that those
35 fees shall not be in excess of one hundred twenty-five dollars
36 (\$125) per hour unless the court determines that a special factor,
37 such as the limited availability of qualified attorneys for the
38 proceeding, the difficulty of the issues presented in the case, or
39 the local availability of tax expertise justifies a higher rate. In the
40 case of each calendar year beginning with calendar year 2001, the

Franchise Tax Board shall recompute the dollar amount referred to in the preceding sentence. That computation shall be made by increasing the amount in this clause by an amount equal to the cost-of-living adjustment determined under subdivision (h) of Section 17041. If any resulting dollar amount is not a multiple of ten dollars (\$10), that dollar amount shall be rounded to the nearest multiple of ten dollars (\$10).

(iv) The court may award reasonable ~~attorney~~ attorney's fees under subdivision (a) in excess of the ~~attorney~~ attorney's fees paid or incurred if the fees are less than the reasonable ~~attorneys'~~ attorney's fees because the attorney is representing the prevailing party for no fee or for a fee which ~~(taking, taking~~ into account all the facts and ~~circumstances)~~ circumstances, is no more than a nominal fee. This clause shall apply only if the award is paid to the attorney or the attorney's employer.

(2) (A) "Prevailing party" means any party to any proceeding described in subdivision (a) (other than the State of California or any creditor of the taxpayer involved) that meets either of the following criteria:

(i) Has substantially prevailed with respect to the amount in controversy.

(ii) Has substantially prevailed with respect to the most significant issue or set of issues presented.

(B) (i) A party shall not be treated as the prevailing party in a proceeding to which subdivision (a) applies if the State of California establishes that its position in the proceeding was substantially justified.

(ii) For purposes of clause (i), the position of the State of California shall be presumed not to be substantially justified if the Franchise Tax Board did not follow its applicable published guidance in the administrative proceeding. This presumption may be rebutted.

(iii) For purposes of clause (ii), the term "applicable published guidance" means either of the following:

(I) A regulation, legal ruling, notice, information release, or announcement.

(II) Any chief counsel ruling or determination letter issued to the taxpayer.

(iv) For purposes of clause (i), in determining whether the position of the Franchise Tax Board was substantially justified,

1 the court shall take into account whether the Franchise Tax Board
2 has lost in any California Court of Appeal in another district on
3 substantially similar issues, as reflected in a decision certified for
4 publication.

5 (C) Any determination under this paragraph as to whether a
6 party is a prevailing party shall be made by either of the following:

7 (i) The court.

8 (ii) An agreement of the parties.

9 (3) The term “civil proceeding” includes a civil action.

10 (d) For purposes of this section, in the case of multiple actions
11 which could have been joined or consolidated, or a case or cases
12 involving a return or returns of the same taxpayer ~~(including,~~
13 ~~including joint returns of married individuals)~~ *individuals*, which
14 could have been joined in a single proceeding in the same court,
15 the actions or cases shall be treated as one civil proceeding
16 regardless of whether the joinder or consolidation actually occurs,
17 unless the court in which the action is brought determines, in its
18 discretion, that it would be inappropriate to treat the actions or
19 cases as joined or consolidated for purposes of this section.

20 (e) An order granting or denying an award for reasonable
21 litigation costs under subdivision (a), in whole or in part, shall be
22 incorporated as a part of the decision or judgment in the case and
23 shall be subject to appeal in the same manner as the decision or
24 judgment.

25 (f) For purposes of this section, “position of the State of
26 California” includes either of the following:

27 (1) The position taken by the State of California in the civil
28 proceeding.

29 (2) Any administrative action or inaction by the Franchise Tax
30 Board (and all subsequent administrative action or inaction) upon
31 which that proceeding is based.

32 (g) ~~The amendments made by the act amending this subdivision~~
33 ~~Chapter 931 of the Statutes of 1999~~ are effective for costs incurred
34 and services performed more than 180 days after the effective date
35 ~~of the act amending this subdivision~~ *Chapter 931 of the Statutes*
36 *of 1999.*

37 (h) *Notwithstanding any other law, this section shall be the*
38 *exclusive means to award attorney’s fees in any civil proceeding*
39 *described in subdivision (a), and attorney’s fees may not be*

1 awarded pursuant to any other statutory provision or common law
2 doctrine regarding the award of attorney's fees.

3 SEC. 3. (a) The amendments made to Section 19717 of the
4 Revenue and Taxation Code by Section 2 of this act shall be applied
5 to any court proceeding brought on or after the effective date of
6 this act.

7 (b) It is the intent of the Legislature that no inference be drawn
8 from the amendments made to Section 19717 of the Revenue and
9 Taxation Code by Section 2 of this act for any court proceeding
10 brought before the effective date of this act.

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13 **All matter omitted in this version of the bill**
14 **appears in the bill as introduced in the**
15 **Senate, February 15, 2011. (JR11)**
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